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No. 04-233

IN THE

Supreme Court of the United States

NXIVM CORPORATION, *et al.*,

Petitioners,

v.

ROSS INSTITUTE, *et al.*.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can copyright law be employed to enforce a non-disclosure agreement by depriving a critic of the ability to raise the defense of fair use in a copyright infringement action when he quotes even a small portion of a cult's "training manual," which the critic obtained from a former victim of the cult, solely on the ground that the cult requires participants to promise to keep its "training program" confidential?

2. Does the fact that material is quoted for the purpose of "criticism" of its author support a finding that the first statutory fair use factor (the purpose and character of the use) favors the alleged infringer in a copyright infringement case?

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STATEMENT

Respondent Ross Institute is a non-profit organization devoted to public education and research concerning cults, controversial groups, and other movements; respondent Rick Ross is its executive director. Ross Institute maintains a database of materials, some prepared specially for the Institute and some prepared for other purposes but collected by the Institute. The Institute provides free public access to that database through its web sites, www.rickross.com and www.cultnews.com. Among the 250 different organizations discussed on the site is petitioner NXIVM Corporation.[1] Respondents' web sites link to articles by respondents John Hochman and Paul Martin, who analyzed various materials and training programs operated by petitioners and expressed opinions about whether NXIVM's programs resemble "mind control," whether its curriculum and operations are "cult-like," whether some of its programs resemble techniques of other groups that seek to overcome independent thinking, and whether the program has negative effects. Both authors quoted from NXIVM's web site and promotional materials, as well as from NXIVM's course manual, to support their critical opinions about petitioners.

The course manual had been obtained by Stephanie Franco, who had registered for a NXIVM program. NXIVM claimed that, as a condition of participating in the "training," Franco had signed an application which, according to petitioners, included an agreement that the course manual would be kept confidential. Ross had been retained by the family of Michael Sutton, Franco's half-brother and another former NXIVM student, to conduct "interventions" to save

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[1]Petitioner First Principles, Inc., is a nominally separate entity that has licensed its intellectual property to petitioner NXIVM.

Sutton from petitioners' "training." There was substantial dispute below about when each of the respondents learned about Franco's claimed violation of an agreement with petitioners, and indeed whether the confidentiality clause was enforceable, even against Franco. The Second Circuit, however, decided the case on the assumption both that respondents' possession of the manual was contrary to the agreement, and that respondents were aware at some relevant time that a confidentiality agreement had been violated. This opposition does not require respondents to question those assumptions as they have done on the merits.

Petitioners sued Franco to bar her from further disseminating the course manual, and sued respondents on various theories, alleging copyright infringement (because the materials had been quoted), product disparagement under the Lanham Act, and interference with contractual relations (by obtaining the materials in breach of Franco's promise). Petitioners moved for a preliminary injunction against all defendants. The district court enjoined Franco from disseminating the course manual; she did not appeal, and she is not a respondent before this Court. However, the district court denied a preliminary injunction against respondents' publication of their critical reports about petitioners, finding no likelihood of success on the copyright claims because respondents' fair use defense was likely to succeed. In an oral opinion, the district court canvassed the four fair use factors, emphasizing that the reports in which copyrighted material was quoted were critical commentary about petitioners, and that the material quoted was reasonably necessary to convey respondents' point. Moreover, although the district court recognized that criticism might tend to suppress demand for petitioners' product, it decided that the writings were "transformative secondary uses" and that any harm arising from biting criticism was not the sort of market harm against which

the copyright laws were directed. The district court also found that petitioners had not established any irreparable harm, and hence denied a preliminary injunction.[2]

Petitioners appealed. In an effort to escape the stringent standard requiring an abuse of discretion, petitioners characterized as an error of law the district court's failure at least to consider, in its evaluation of the first prong of the test for fair use (the purpose and character of the use), whether respondents obtained the quoted materials through an intermediary's breach of contract, while also asserting that exploitation of a "purloined manuscript" showed a lack of good faith that ought to be sufficient to deprive respondents of the "equitable defense" of fair use. Petitioners also argued that the district court had erred as a matter of law in its evaluation of the third fair use factor (quantity of materials taken) because it compared the number of words quoted to the entire course manual instead of counting each "course module" separately, on the ground that copyright in each module had been registered separately. Finally, petitioners took issue with the district court's analysis of market harm, contending both that absence of market harm was irrelevant to fair use and that, in any event, sufficient harm had been shown.

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[2]The district court also found no violation of the Lanham Act because (1) the alleged inaccuracies in respondent Hochman's report did not "rise to the level of false or misleading representations about a material facet of plaintiffs' product," (2) even if there had been material misrepresentations, Hochman's report was not "commercial advertising or promotion," and (3) the report was protected by the First Amendment. Because certiorari is not sought on any question relating to the Second Circuit's ruling on the Lanham Act claims, they are not discussed further in this opposition.

In a unanimous opinion authored by Circuit Judge John Walker, the Second Circuit ruled that respondents had the burden of "demonstrating that their copying is protected by the fair use doctrine," 364 F.3d 471, 476, and accepted petitioners' argument that the district court had erred by failing to consider "more fully and explicitly" that defendants should have known that they were using a copy that had been acquired in an unauthorized manner. *Id.* at 477. However, after a full balancing of the statutory fair use factors, the court found in favor of respondents, and hence affirmed denial of the preliminary injunction.

With respect to the first factor, the "purpose and character" of the allegedly infringing use, the court began by recognizing that respondents were engaged in a critical analysis of the copyrighted work, and that "use of quotations from the manual to support their critical analyses of the seminars is transformative." *Id.* at 477. Indeed, all of the uses specifically identified in section 107 are transformative, and hence the court said that when those uses are at issue, factor one presumptively favors the defendant. Still, the court below found fault with the trial judge's failure to consider the impact of respondents' use of a copy that had been provided to them in breach of a confidentiality clause of a contract. The Second Circuit assumed, for purpose of its decision, that use of such an unauthorized copy amounted to bad faith on the part of respondents, and it recognized that the propriety of a defendant's conduct "is an integral part of the analysis under the first factor." *Id.* at 478. The court agreed that, in *Harper & Row Pub. v. Nation Enterprises*, 471 U.S. 539, 562-563 (1985), this Court had given weight to the fact that defendants there had "knowingly acquired a purloined manuscript for the very purpose of preempting the plaintiff's first publication rights," 364 F.3d at 478-479, but noted that this was not the end of the analysis. Rather, the Second Circuit reasoned, this

Court's analysis of the first factor also rested on The Nation's "fail[ure] to make any substantial transformative use of the copyrighted work," *id.* at 479, and indeed this Court further instructed that "no single fair use factor is dispositive." *Id.* By contrast with the facts in *Harper & Row*, the Second Circuit found that, because the course manual had been quoted only in the context of a critical analysis of the document and its role in petitioners' operations, the infringing work was substantially transformative, and hence the "breach of contract" consideration was outweighed by other considerations relevant to the first fair use factor.

The Second Circuit then proceeded to weigh the remaining fair use factors. Because petitioners' work was unpublished, the second factor (nature of the copyrighted work) favored petitioners. *Id.* at 480. By contrast, it found both that the quotations represented only a small portion of the total work, *id.* at 480-481, and that respondents had not taken the "heart" of the copyrighted work. Accordingly, the third factor (amount taken) favored respondents. *Id.* at 481. Indeed, respondents had not taken more copyrighted material than necessary, because "to support their critical commentary, it was reasonably necessary for defendants to quote liberally from NXIVM's manual." *Id.* Finally, the fourth factor (effect on petitioners' market) favored respondents because the impact about which petitioners were complaining – the possibility that NXIVM would sell fewer copies because respondents' criticisms were so devastating – was not a valid consideration. *Id.* at 482.

Judge Jacobs concurred in the Court's opinion, but wrote separately to express skepticism about whether the manner in which an author obtains material that he desires to criticize should bear at all on fair use analysis. *Id.* at 483-487.

REASONS FOR DENYING THE WRIT

After a careful analysis of the statutory fair use factors, the court below affirmed the denial of a preliminary injunction against respondents' quotation of selected portions of NXIVM's "training manuals" in order to show the basis for respondents' criticisms because respondents were likely to succeed in a fair use defense. There is no square conflict among the circuits on either of the questions on which petitioners seek review, and there is no conflict between the decision below and any of this Court's decisions. Moreover, the holding below on the first Question Presented accepted an argument that petitioners made in the Second Circuit, and the second Question is not squarely presented, as explained further below.

A. There is No Square Conflict on the First Question, and the Second Circuit's Analysis Is Consistent with Petitioners' Arguments Below.

Petitioners seek review of the Second Circuit's refusal to reject respondents' fair use defense solely because respondents obtained the copy of the document that they quoted from an individual who breached a confidentiality agreement that she signed when paying petitioners to "train" her. According to petitioners, it was not sufficient for the Second Circuit to give substantial consideration to this fact in analyzing the "purpose and character of the use" factor; to them, any use of an unauthorized copy is necessarily not a fair use. Petitioners wrongly assert that this Court so directed in *Harper & Row*, and that the Federal Circuit has endorsed that understanding of *Harper & Row* in *Atari Games Corp. v. Nintendo*, 975 F.2d 832 (Fed. Cir. 1992). In fact, this Court's

treatment of the "purloined copy" issue in *Harper & Row* shows that this issue was only one of several factors in the Court's own analysis of fair use. Moreover, the Second Circuit gave the issue the exact consideration that petitioners sought in their briefs below, and although the Federal Circuit's decision contains broad language that could support petitioners' argument, the *Atari* case arose in a very different context than this case, and no court (including the Federal Circuit) has applied its ruling to a case like this one where the only reason why use was unauthorized was a claimed violation of a contractual confidentiality clause. In short, petitioners' extreme approach to the question is insupportable.

1. The Court should not grant certiorari because the Second Circuit adopted the very position that petitioners put forward in their briefs below. For example, in their opening brief, petitioners argued that "the first factor . . . requires **consideration** of the misappropriation of the confidential unpublished writings," page 11 (emphasis added), that *Harper & Row* held that "a court must **consider** whether [defendant] obtained the materials through an intermediary's acts of misappropriation," page 12 (emphasis added), and that the district court's error was that it "did not give any consideration in its analysis for the first prong of the fair use test to the manner that Defendant Franco wrongfully appropriated" the manual. *Id.* Indeed, the caption of argument section I(A)(1) characterized the district court's error as "Not Considering Ross' Knowledge of the Bad Faith Act of Defendant Franco." Page 12. At the same time, petitioners cited *Atari* for the proposition that to invoke fair use, "an individual must possess an authorized copy of a literary work," without ever acknowledging that it was simultaneously urging two different standards. And in its reply brief, petitioner not only never mentioned *Atari*, but argued **only** that *"Harper & Row* Is Authoritative for Consideration of 'Bad Faith' Of the Infringer

in the First Prong of the Fair Use Test," page 4, Caption, that the first factor "necessitates weighing bad faith in the acquisition of the copyrighted work," page 5, and that the reversal was needed because "the District Court fail[ed] to account for such bad faith." Having asked the Second Circuit to **consider** the manner in which their work was obtained, petitioners cannot now seek review because the Second Circuit adopted that approach but did not end its opinion after considering that point.

2. Petitioners have also overstated the split between, on the one hand, the Second and Ninth Circuits, which require only consideration of the manner in which the copyrighted work was obtained as one aspect of the first factor, and the Federal Circuit's decision in *Atari*, on the other hand. The Federal Circuit case arose because Atari, having tried and failed to reverse-engineer one of Nintendo's computer programs through a careful examination of its object code, obtained a copy of the source code from the Copyright Office by lying about its reason for obtaining the source code. Only by using this improperly obtained source code was Atari able to complete the task of replicating the computer program through reverse engineering, for the ultimate purpose of creating a product for sale in direct competition with Nintendo. It was Atari's **own conduct** that was fraudulent and in direct violation of the Copyright Office's regulations. It was in this context that the Federal Circuit used the language on which petitioners rely – "To invoke the fair use exception, an individual must possess an authorized copy of a literary work." 975 F.2d at 843.

This holding is best understood as denying protection of the fair use defense to the very party who defrauded the Copyright Office, thereby enforcing regulations that limit the uses to which a copy obtained from that Office may be put. But the Federal Circuit has never applied this holding to any other

form of unauthorized possession, not to speak of using it to enforce, against a third party who never signed a contract with the copyright holder, a copyright holder's contractual limitations on the way in which its customers may use materials that they have purchased.

Indeed, this Court's treatment of the "purloined manuscript" in *Harper & Row* demonstrates that the improper source of a copy is only one factor to be considered in a complete analysis of the fair use factors. The Court simply stated that "also relevant to the 'character' of the use is 'the propriety of the defendant's conduct.'" 471 U.S. at 562. However, the Court continued the discussion of fair use for another seven pages. *Id.* at 562-569. Had the use of a purloined copy been sufficient, standing alone, to negate the fair use defense, the Court's mention of that fact would have been the end of the opinion.

3. Moreover, petitioners' analysis makes no sense. On petitioners' theory, a completely non-commercial and transformative use of a document originally obtained in violation of contract would necessarily constitute infringement with no possibility of raising a fair use defense; there could be no finding of fair use even if defendant quoted only fifty words out of a 500-page work, in the course of a 100-page analysis, even if defendant's work created controversy that encouraged more consumers to buy the plaintiff's work so that they could follow the debate. Indeed, a newspaper that obtained a "smoking gun" letter, showing that a corporation or a state government official had engaged in serious misconduct or committed a crime, would be forbidden from publishing or even quoting from the memorandum so long as the author of the memo had required all of its employees to sign confidentiality agreements. Even a person who came across written evidence of a crime and provided a copy of the evidence to the police could be sued for copyright infringement

and statutory damages so long as the individual was subject to a non-disclosure contract. Presumably the police could also be sued for infringement for making a copy of the evidence for the prosecutor to introduce at trial, if the evidence was originally disclosed in violation of a contract.

Yet it is often necessary to quote materials that an author is criticizing in order to make a persuasive case for criticism. Indeed, when writing about cults and other controversial organizations that have a reputation for suing for defamation or disparagement (as petitioners did under the Lanham Act), the quotation of materials that form the basis for criticism is needed in order to support the defense that the author is simply expressing an opinion based on fully disclosed facts, not to speak of as a matter of sound journalistic or scholarly practice. The "unauthorized copy" defense should not deprive such authors of the ability to protect themselves against such suits.

The purpose of copyright law is to preserve to authors the commercial benefits of their creativity, not to help parties keep their wrongdoing secret by enforcing confidentiality contracts. *Diebold, Inc. v. Online Policy Group*, 2004 WL 2203382 (N.D.Cal.), at *6, citing *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 591-592 (2004). Making a copy may violate a legal obligation, but publication of a part of that copy – particularly when made by someone not under that legal obligation – may be outweighed by other considerations of social benefit. The Second Circuit applied the proper analysis, and certiorari should not be granted to consider that question further in this case.[3]

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[3]The *Diebold* case shows the sort of mischief that petitioners' theory could facilitate. Certain persons uncovered a cache of secret emails among employees of Diebold, a maker

B. The Second Question Is Not Presented Here, Because Petitioner's Question Is Based on a Mischaracterization of the Second Circuit's Reasoning.

The second Question Presented charges the Second Circuit with deciding "that an otherwise infringing use of copyrighted materials is presumptively fair, so long as it can be labeled 'criticism.'" Petitioners argue that this aspect of the opinion is contrary to a passage in this Court's opinion in *Harper & Row*, stating that section 107's list of examples of the

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of electronic voting machinery and software. Copies of the emails, which revealed that some Diebold employees were aware of problems with Diebold's systems, were published on various web sites to foster discussion of security flaws that could allow elections to be fixed. Diebold, asserting that the emails were "purloined" and disclosed in violation of secrecy agreements, embarked on a campaign to suppress publication of the emails, asserting that they were protected by copyright and that fair use could not apply because they were stolen. Rather than filing suit, Diebold invoked its rights under the Digital Millenium Copyright Act to send "takedown" notices to the Internet Service Providers, insisting that they remove the emails from their customers' web sites or face liability for infringement. If petitioners' theory were correct, the fact that the emails were originally released in violation of an employee's non-disclosure agreement would have been fatal to any fair use defense, and Diebold would have been successful in suppressing this important public debate. In *Diebold*, however, the district court awarded attorney fees against Diebold for issuing frivolous take-down notices. *Id.* at *6-*7.

kind of uses that could be "fair" was "not intended to single out any particular use as presumptively a 'fair' use. The drafters . . . structured the provision as an affirmative defense requiring a case-by-case analysis." 471 U.S. at 561. This Court went on to decide that even though The Nation had argued that its use was "news reporting," the main news was its infringement.

The Question Presented, however, misstates what the Second Circuit decided. As the text of the Petition acknowledges, at 17, the court below simply noted that, **in deciding the first factor**, the key question is whether a use is "transformative," and it then looked to section 107's listing of possibly fair uses to decide what sorts of uses were properly characterized as transformative.[4] And, far from simply accepting respondents' **label**, the court examined the work in question and determined that it was, in fact, a critical analysis. Although the Second Circuit did use the word "presumption," the court did not in fact apply any presumption in finding that the first "fair use" factor favored respondents, but carefully considered the character of the respondents' works. Indeed, it conducted just the sort of "case-by-case analysis" that this Court demanded in *Harper & Row*. There is no conflict with any of this Court's decisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[4]The Fourth Circuit's decision in *Sundeman v. Seajay Society*, 142 F.3d 194, 203 (1998), condemned by petitioners on the theory that it "repeated the Second Circuit's error," Pet. at 17, similarly treats the fact that a use fits within section 107's examples as showing its transformative character, and thus as "one factor" supporting a finding of fair use.

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